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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1376

STEPHEN PLISS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Stephen Pliss respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals was delivered orally in open court and is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 8, 1980 (Appendix A, *infra*). On January 28, 1980, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including March 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Where willfulness and intent are the critical factors to be proven in a criminal prosecution for tax evasion and filing a false tax return, whether the Court of Appeals erred in upholding the exclusion of documentary evidence and testimony proffered by the defense which would have proven both that (a) petitioner neither physically received the contested item of income during the tax year in question and (b) petitioner was incompetent and disorganized in matters relating to his income tax returns and, thus, lacked the requisite knowledge or intent to have knowingly and intentionally attempted to evade payment of taxes or filed false or fraudulent returns.

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution.

Title 26 United States Code § 7201.

Title 26 United States Code § 7206(1).

The pertinent text of the foregoing provisions is set forth in Appendix B, *infra*.

Statement of the Case

Petitioner was convicted after a jury trial before the United States District Court for the Southern District of New York (Brieant, J.) of attempting to evade a portion of his 1973 individual income tax and of filing a false individual income tax return for 1973, in violation of 26 U.S.C. §§ 7201 and 7206(1). Petitioner was sentenced to a term of four months' imprisonment and a total committed fine of $10,000. The conviction was affirmed by the United States Court of Appeals for the Second Circuit.

Indictment 79 Cr. 227, filed on April 10, 1979, charged petitioner in two counts with attempting to evade a portion of his 1973 income tax and with filing a false individual tax return for 1973, in violation of 26 U.S.C. §§ 7201 and 7206(1). The central allegation of the indictment was that petitioner intentionally failed to report two items of income on his individual income tax return for calendar year 1973, which was filed on June 14, 1974. The first of these unreported items was a $9,671 profit earned by petitioner's Subchapter S corporation, Stephen Associates, Inc., for the fiscal year ending September 30, 1973.* The second item was $15,000 in "professional fees" which petitioner's accountant had recorded on Stephen Associates' books as having been paid to petitioner in fiscal year 1973.

During the period of 1961 through 1974, Stephen Associates, Inc. was engaged in the business of placing advertisements for commercial enterprises for broadcast over radio stations throughout the country. Petitioner was both the sole stockholder and sole employee of Stephen Associates. For accounting purposes, Stephen Associates operated on a September 30 fiscal year and from 1962 through 1974 elected to be treated as a Subchapter S corporation. As a result of that election, the corporation was required to file a federal income tax return, but paid no income tax on its profits. Rather, the corporation's profits were reported on the individual tax return of petitioner and any tax due on the profits was paid by petitioner individually.

For many years, petitioner had retained Howard Acker, an accountant, to prepare both Stephen Associates' corporate and petitioner's individual tax returns. At the end of each fiscal year, petitioner gathered his company's checkbook, bank statement, cancelled checks and other rec-

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* A Subchapter S, or small business, corporation pays no federal income tax. Instead, its profits are declared as income on its owner(s)' individual return and taxed accordingly.

ords and dropped them at Acker's office. From these records, Acker's staff would prepare the corporation's books of account, its financial statement, its tax returns and petitioner's individual tax returns. Acker generally met with petitioner twice a year—once relative to his corporate return and once relative to his individual return.

Eventually, petitioner sought to change the corporation's Subchapter S status and, consequently, asked Acker to make the change during 1972. Acker, however, neglected to do so, which, among other things, led petitioner to seek a new accountant. Hence, in early 1974, unbeknownst to Acker, petitioner approached accountant Murray Malinofsky to do his accounting work. During their first conversation, petitioner complained to Malinofsky that Acker had neglected to remove the corporation from Subchapter S status despite repeated requests that he do so. Accordingly, Malinofsky was officially hired soon thereafter, in March 1974.

By February 1974, Acker's firm had completed the books of account for Stephen Associates for the fiscal year ended September 1973. Acker testified that in February 1974 he spoke with petitioner and recommended designating $15,000 of Stephen Associates' profits as a "professional fee" to petitioner, which designation would help to reduce the corporation's state and local taxes.*

Thus, for the fiscal year ended September 1973, Acker reduced the corporation's profits by $15,000, noting that it had been paid to petitioner as "professional fees"—using the $15,000, on paper, to reduce his loan account with Stephen Associates by that amount. Thus, even though petitioner did not physically receive the $15,000 in 1973,

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* Acker admitted, however, that he never discussed with petitioner how the designation of this $15,000 would affect his individual tax return nor did he prepare any 1099 forms to reflect this $15,000 fee to petitioner even though such forms must be filed with the IRS to show receipt of all "professional fees."

he had $15,000 of debt to his company exonerated in that year; therefore, according to the tax laws, petitioner had to declare that $15,000 as income in 1973.

In the transition from Acker to Malinofsky, however, petitioner neglected to tell Acker not to prepare his current individual return. As a result, in March 1974, Acker's office prepared both the corporate return for fiscal 1973 and the individual return for calendar 1973 for petitioner. Having prepared the books of account for Stephen Associates, Acker knew that the company still was a Subchapter S corporation for fiscal year 1973.* He further knew about the "reclassification" of the $15,000 as a professional fee to petitioner. Accordingly, the Acker 1040 listed Stephen Associates' corporate profit for the past fiscal year ($9,671) under "dividend income" and the $15,000 under "fees." Significantly, the Acker 1040 did not identify the source of either the dividends or the fees.

The total amount of tax due listed on the Acker 1040 was $10,986. Petitioner did not file this return and did not show it to Malinofsky because, as he explained, he did not want Malinofsky to use it as a "copy card."

With the extended filing date of June 15, 1974 rapidly approaching—and with both petitioner and Malinofsky still in the dark as to whether Stephen Associates was still a Subchapter S corporation, they agreed to file petitioner's individual tax return for 1973 under the assumption that Stephen Associates finally had been removed from Subchapter S status by Acker. It was further understood that if they subsequently discovered otherwise, they would file an amended return.

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* Significantly, when Malinofsky first asked petitioner if the corporation was still in Subchapter S status, in March 1974, petitioner replied that he didn't know.

Using W-2 forms for petitioner and his wife and the capital gains schedule prepared by Acker's office, plus various other documents relating to miscellaneous deductions and interest income, Malinofsky prepared a joint individual return for petitioner and his wife for 1973. Since Malinofsky did not know that Stephen Associates was still a Subchapter S corporation, the Malinofsky 1040 did not show the company's $9,671 book profit for fiscal year 1973. Similarly, since Malinofsky did not know about Acker's "reclassification" of the $15,000, that item was also missing from the Malinofsky 1040. Because of the omission of these two items, the Malinofsky 1040 showed that petitioner was entitled to a $342 refund.

Petitioner was given the Malinofsky 1040 on June 6, 1974. He testified that when he saw that the Malinofsky 1040 showed approximately $10,000 less in tax due than the Acker 1040, he attributed this disparity to the different tax treatment which the two accountants had given to certain commodities losses.

On June 14, 1974, petitioner mailed two contradictory returns to the same IRS office in Holtsville, New York: (1) the Malinofsky 1040, which omitted the Subchapter S profit of $9,671 and the "professional fee" of $15,000; and (2) the corporate return for Stephen Associates for fiscal year 1973 which showed both the corporation's profit and $16,300 in "professional fees."

In December 1974, in connection with an IRS audit of his tax situation, petitioner met with Malinofsky about doing Stephen Associates' corporate return for fiscal year 1974. When Malinofsky asked to see petitioner's corporate return for fiscal year 1973, petitioner mistakenly brought his company's financial statement. Then, when he did produce the requested corporate return, Malinofsky told him that Stephen Associates was still a Subchapter S corporation in 1973 and that, therefore, he would have to file an amended individual return for 1973 to reflect

Stephen Associates' profits as income. The amended return, filed in January 1975, picked up the $9,671 profit but again omitted the $15,000 "professional fee." In filing this amended return, petitioner paid the applicable tax plus interest and penalties on the $9,671 in originally unreported income.

In April 1975, a Special Agent of IRS was called in by the revenue agent who had done the prior audit. Although petitioner was initially read his rights—which "shocked" him, according to the agent—petitioner nonetheless spoke to the agents about his 1973 individual return. Petitioner explained to the agents that he did not understand what a "professional fee" was and that when he spoke to Acker by telephone, petitioner "wanted to know what this professional fee was all about."

Soon thereafter, petitioner obtained the advice of counsel, and, accordingly, in June 1975, filed a second amended return for 1973 which included the $15,000 "professional fee." All tax due was paid in July 1975. Full interest was paid in Fall 1977. Petitioner was indicted in April 1979.

REASONS FOR GRANTING THE WRIT

The trial court's exclusion of defense evidence tending to demonstrate that petitioner lacked the requisite knowledge and willfulness to violate the federal tax laws constituted fundamental error warranting reversal.

A. The Exclusion of Documentary Evidence

The Government's case against petitioner was built on the theory that the $15,000 which had been denominated a "professional fee" by Acker was actually distributed to him in 1973, and that, accordingly, he must have known that he was liable for that $15,000 on his 1973 tax return. Peti-

tioner, however, sought to introduce at trial documentary evidence from Acker's office which demonstrated Stephen Associates did *not* distribute that $15,000 to him—that, instead, the $15,000 "professional fee" was a paper transaction in which Acker's office merely exonerated debts incurred by petitioner to the corporation in prior years.

The particular evidence the defense sought to introduce came from Stephen Associates' books of account as prepared by Acker's office—clearly the definitive source of information on how much money the company distributed to petitioner in any given year. There was no question about the books' authenticity or accuracy.

If the Government's theory had been correct, these documents would have shown that petitioner took out not only his gross salary of $26,000 (including the payment of withholding tax thereon) but also an *additional* $15,000 in "professional fees". The documents, however, did not support the Government's argument.

Instead, the documents showed that petitioner's personal withdrawals from Stephen Associates ("drawings" minus business expenses paid out of "drawings") plus his withholding taxes paid by the company in 1973, totaled slightly *less* than his gross salary of $26,000 as reflected on his W-2 form. Hence, the documents unequivocally proved that he did *not* distribute an additional $15,000 to himself from Stephen Associates in calendar year 1973.

Had petitioner been permitted to put this evidence before the jury, he could have forcefully argued that he didn't realize he had to pay taxes on the $15,000 in 1973 because he never actually *received* the $15,000 in 1973, and, thus, did not comprehend that it constituted income to him in 1973.

The trial court, however, precluded him from introducing this exculpatory evidence on relevance grounds, alone, and. in so ruling, improperly prevented him from demon-

strating his lack of criminal intent in failing to report that $15,000 on his 1973 individual tax return.

As recently as *United States* v. *Sternstein,* 596 F.2d 528, 530 (2d Cir. 1979), the Second Circuit stated that:

> The critical element in a tax fraud case . . . is the mental state of the defendant. *See United States* v. *Leonard,* 524 F.2d 1076, 1081 (2d Cir. 1975), cert. denied, 425 U.S. 958, 96 S.Ct. 1737, 48 L.Ed. 2d 202 (1976). Courts have repeatedly observed that in such cases the "accused as part of his defense is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent." *United States* v. *Brown,* 411 F.2d 1134, 1137 (10th Cir. 1969); *accord, Black* v. *United States,* 309 F.2d 331, 337 (8th Cir. 1962); *see Haigler* v. *United States,* 172 F.2d 986, 987 (10th Cir. 1949).

In *Sternstein,* the defendant was accused of falsifying his clients' tax returns so that they would return to him year after year as satisfied customers. To rebut this accusation and demonstrate his innocent intent, the defendant attempted to prove that an IRS investigation showed that he prepared perfect returns for the overwhelming number of his clients. The district court refused to allow such evidence before the jury. The Second Circuit, however, remanded the case to the district court with instructions that it determine whether the IRS report was consistent with defendant's position, and that if it was, the district court should order a new trial in which the defendant would be allowed to offer this exculpatory evidence.

In *United States* v. *Brown,* 411 F.2d 1134 (10th Cir. 1969), cited with approval in *Sternstein,* the defendant acknowledged that he received items of unreported income. He claimed, however, that because of a rather complicated agreement he had with his employer, he honestly believed

that these items of income were not taxable income to him. The district court prevented the defendant from introducing exculpatory evidence which tended to corroborate his story, and the Tenth Circuit reversed on that basis.

Similarly, in *Haigler* v. *United States,* 172 F.2d 986 (10th Cir. 1949), the defendant sought to demonstrate that he misunderstood the tax laws as they pertained to the particular transactions in issue, and that if he had understood the proper tax treatment of those transactions, he would have reported them on his tax return. Evidence to corroborate defendant's claim of misunderstanding was excluded by the trial court on the grounds of relevance ("ignorance of the law is no excuse"). The Tenth Circuit reversed, holding that such evidence "was plainly admissible as bearing upon the essential element of intent to commit the offense charged . . ." *Id.* 172 F.2d at 988.

Moreover, only recently, the Fifth Circuit, sitting *en banc,* similarly held that the failure of the district court to permit experts for the Government and defense to testify as to the taxability of receipt of funds for the sale of blood plasma, coupled with the District Court's refusal to instruct the jury that a reasonable misconception of the tax laws on defendant's part would negate the necessary intent thereby rendered defendant's trial fundamentally unfair. *United States* v. *Garber,* 607 F.2d 92 (5th Cir. 1979) (*en banc*).

Noting that the question of defendant's willfulness and intent was the most crucial element that the Government must prove, the Fifth Circuit ruled that:

> "The parties in this case presented divergent opinions as to the ultimate taxability by analogy to two legitimate theories in tax law. The trial court should not have withheld this fact, and its powerful impact on the issue of Garber's willfulness, from the jury . . . (citations omitted) . . . In a case such

> as this where the element of willfulness is critical to the defense, the defendant is entitled to wide latitude in the introduction of evidence tending to show lack of intent." *Id.*, 607 F.2d at 99.

So, too, it is in the case at bar. Petitioner, like the defendants in *Sternstein, Brown, Haigler* and *Garber,* was attempting to show that his conduct in the filing of his returns was wholly innocent—the result of mistake and confusion and not the result of a willful attempt to evade taxes or file a false return.* The trial court's failure to allow him to show that he did not pay himself a $15,000 "professional fee" in calendar year 1973 deprived him of the "wide latitude" which the Second Circuit held he was "entitled to . . . to show lack of specific intent". *United States* v. *Sternstein, supra,* 596 F.2d at 530. Hence the exclusion of this exculpatory evidence must be considered reversible error.

Moreover, the refusal of the trial Court to allow the jury to consider the exculpatory evidence offered by the defense deprived petitioner as well of his constitutional rights to compulsory process and due process of law—a deprivation of rights that was further exacerbated by the Government's subsequent false argument to the jury that the $15,000 was actually distributed to him in 1973. Such a preclusion of defense evidence from the jury, taken in conjunction with the Government's prejudicial argument to the contrary, was thus clear error.

The compulsory process clause, born at a time of political oppression in England, was specifically designed to

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* *See Spies* v. *United States,* 317 U.S. 492 (1943) (where it was held that the federal income tax evasion statute "embodied 'the gravest of offenses against the revenues' and . . . that willfulness must therefore include an evil motive and want of justification *in view of all the circumstances. Id.,* 317 U.S. at 498." *James* v. *United States,* 366 U.S. 213, 221 (1961)).

give a criminal defendant commensurate power with the Government to place evidence before the jury.* The Supreme Court clearly expounded this principle as recently as *United States* v. *Nixon,* 418 U.S. 683 (1974); and it is now beyond cavil that the compulsory process and due process clauses afford an accused the right to discover witnesses and documentary evidence in his favor, to produce witnesses and such evidence in court, to introduce the testimony of such witnesses and such documents into evidence and to have them believed. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harvard L. Rev. 567 (1978). *See also, Chambers* v. *Mississippi, supra,* 410 U.S. at 302 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense"); *Cool* v. *United States,* 409 U.S. 100 (1972); *Webb* v. *Texas,* 409 U.S. 95 (1972).

The standard for review of the exclusion of such exculpatory evidence from the jury entails evaluating the possibility that such evidence, once admitted, "could . . . in any reasonable likelihood have affected the judgment of the jury," *Giglio* v. *United States,* 405 U.S. 150, 154 (1972); *Johnson* v. *Brewer,* 521 F.2d 556, 563 (8th Cir. 1975); *Flores* v. *Estelle,* 492 F.2d 711, 713 (5th Cir. 1974).

It makes no difference how the exculpatory evidence is excluded—by impeachment of prosecution witnesses, by eliciting exculpatory testimony from prosecution witnesses or by denying the accused the right to call his own witnesses. The sole question is whether the suppressed evidence is material. *See, Welcome* v. *Vincent,* 549 F.2d 853, 857 (2d Cir. 1977) ("a significant restriction on a defend-

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* *See* I. J. Stephen, *History of the Criminal Law of England,* 325-355 (1883); *Washington* v. *Texas,* 388 U.S. 14 (1966). For a complete analysis, see Westen, *The Compulsory Process Clause,* 73 Mich. L. Rev. 71 (1974); Westen, *Compulsory Process Clause II,* 74 Mich. L. Rev. 191 (1975).

ant's examination of a witness . . . is alone enough to deny a defendant a fair trial" if the ruling operates to exclude evidence "which, if true, would have exonerated [him]"); *United States* v. *Goodlow,* 500 F.2d 954, 958 (8th Cir. 1974) (exclusion of exculpatory hearsay alone was enough to deny fair trial "because we cannot say beyond a reasonable doubt that the excluded evidence would not have changed the jury's verdict"). *See also,* Westen, *Confrontation and Compulsory Process, supra,* 91 Harvard L. Rev. at 579-581; 590-593; 608 n. 12.

Here, as in *Johnson* v. *Brewer, supra,* the quintessential point was that, "the jury must be given an opportunity to assess the . . . incident [in this case the non-receipt of the $15,000 in 1973] in whatever manner it wishes." *Id.,* 521 F.2d at 562. The rejection of defense efforts to affirmatively demonstrate petitioner's innocent intent by the introduction of clearly exculpatory evidence withheld from the jury evidence necessary to a discriminating appraisal of petitioner's guilt.

Where, as in this case, the question of defendant's guilt or innocence was extremely close and where the evidence excluded was of a potentially exonerative nature, the trial court's exclusion of that evidence may hardly be considered harmless error. This is particularly true in the instant case, where petitioner was denied the right to present his version of the facts in defending against the Government's accusations—a right of constitutional dimensions.

Here, where the critical element to be determined by the jury in this tax fraud prosecution was "the mental state of the accused" (*United States* v. *Sternstein, supra,* 596 F.2d at 530), it was incumbent upon the trial court to have provided defendant with the greatest latitude in introducing potentially exculpatory evidence tending to show lack of specific intent. *United States* v. *Brown, supra,* 411 F.2d at 1137; *Black* v. *United States, supra,* 309 F.2d at 337; *Haigler* v. *United States, supra,* 172 F.2d at 987. The trial

court's preclusion of defense evidence in this regard thus constituted fundamental error warranting reversal.

B. Exclusion of Opinion Testimony

One of the central issues at trial was whether or not petitioner comprehended the manner in which his tax returns were prepared by Acker and Malinofsky. The Government described him as "a very successful 50-year-old businessman . . . in a very sophisticated industry . . . [who knew] his way around . . . [and who] knew perfectly well what he was doing" (Tr. 474, 476). The defense, on the other hand, portrayed him as a man who lacked understanding of financial matters in general and his tax returns in particular. Thus, there was a substantial issue raised as to how well petitioner was able to understand the 1973 tax returns which his accountants had prepared for him.

To demonstrate his confusion and disorganization when it came to taxes, the defense attempted to elicit testimony in this regard from the two witnesses who were most qualified to evaluate petitioner's degree of sophistication in this area: the accountants Acker and Malinofsky. The trial court, however, would not permit the defense to pursue this line, and, once again, frustrated the defense's attempts to demonstrate petitioner's wholly innocent intent. *Cf. United States* v. *Sternstein, supra.*

In attempting repeatedly to elicit testimony on this subject, defense counsel asked Acker the following questions, the objections to which were all sustained by the court apparently on the grounds that they were irrelevant and opinion testimony:

> Q. Mr. Acker, in terms of these—of the 1120 S [Stephen Associates' corporate return for 1973] which had been prepared by your firm, can you tell us whether it would be obvious to someone looking at that 1120 S that $50,000 [sic] in fees would be tax-

able to Stephen Pliss? (Tr. 169)

Q. Can you tell us whether or not in your estimation that Mr. Pliss might not have realized that the $15,000 of the corporate income was reflected in the 1040? (Tr. 170)

Q. Mr. Acker, is it your testimony that Mr. Pliss realized that the $15,000 of corporate income is reflected in his 1040 as a fee? (Tr. 175)

The answers to these questions were clearly relevant, as demonstrated by the obvious exculpatory inferences that could be drawn therefrom. By preventing Acker from answering these questions, the trial court prevented the defense from both *rebutting* the damaging inferences which could have been drawn from Acker's earlier testimony and inhibited the defense *affirmatively* arguing the exculpatory inferences. The court's ruling also had the effect of blocking possible impeachment of Acker by his own prior statements.

Testimony from Malinofsky relating to the issue of defendant's intent similarly was excluded by the trial court. To demonstrate petitioner's inherent disorganization, defense counsel focused on Malinofsky's meeting with him in petitioner's office in December 1974 (when Malinofsky first saw Stephen Associates' tax return for the year ended September 30, 1973). Thus, Malinofsky was asked:

Q. Are you able to describe the quality of his [Pliss'] record keeping? (Tr. 227-28)

[and]

Q. Are you able to describe for us whether or not Mr. Pliss maintained orderly tax files? (Tr. 228)

Objections to both questions were sustained, blocking the obvious defense arguments that petitioner's record keeping was exceptionally poor and that his tax files were hopelessly disorganized—testimony clearly related to the issue of defendant's specific intent.

As it had done before, the Government blatantly exploited the fact that it had excluded this exculpatory testimony, by arguing a position which was diametrically opposed to the excluded testimony. Specifically, the following statement was made about petitioner in the Government's rebuttal summation:

> ". . . [H]e is a careful man, . . . he is a methodical businessman, . . . he keeps precise records, . . . he knows how to keep track of things." (Tr. 500)

Hence, once more, defendant was stopped in his attempt to introduce exculpatory evidence and was then attacked on the very issue which he unsuccessfully sought to resolve in his favor through the introduction of the proffered evidence.

A second area in which Malinofsky was prevented from providing potentially exculpatory testimony also concerned his December 1974 meeting at petitioner's office. Significantly, Malinofsky testified that during that meeting, he asked petitioner for a copy of his corporate return and was shown a financial statement instead. From this testimony two inferences could have been drawn: either petitioner was playing dumb, or he was so unsophisticated that he didn't know the difference between a corporate return and a financial statement. Clearly Malinofsky was in the best position to judge which one of these two inferences was correct, since he was present when this occurred. Thus, Malinofsky was properly asked:

> Q. Do you know whether or not he [Pliss] gave you that [financial] statement [of Stephen Associates] in the belief it was a corporate return? (Tr. 230)
>
> [and]
>
> Q. Did he [Pliss] know what the corporate return was? (Tr. 231)

The Government's objections to both questions were sustained.

The answers to these questions were extremely important. It was undisputed that, in June 1974, when Malinofsky asked petitioner if he had received his corporate return for the year ended September 30, 1973, petitioner told him no. As noted above, he explained that his mistaken answer to Malinofsky was prompted by his ignorance of what Malinofsky wanted and by his failure to recognize the corporate return as the document which Malinofsky sought.

Since a man of ordinary intelligence might have been expected to understand and recognize what Malinofsky wanted, the answers to these questions would have shown that Malinofsky had observed that petitioner was *not* possessed of such intelligence—at least in this limited area. Failure to allow Malinofsky to respond to these questions, therefore, deprived the defense of an important opportunity to introduce crucial exculpatory evidence on the key issue of intent.

The trial court did not state its reasons for excluding the Acker and Malinofsky testimony in this area. To the extent that the testimony may have been deemed irrelevant, such a finding would have ignored the great value of this testimony in resolving the issue of defendant's state of mind. To the extent that the Court's ruling may have been based upon the view that this was improper "opinion" evidence, such a ruling would have been contrary to Rule 701 of The Federal Rules of Evidence which reads:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witnesses and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Referring first to the requirement of Rule 701(a) it is clear that the questions asked of Acker were "rationally

based on the perception of the witnesses [Acker]", who had seventeen years in which to observe petitioner in connection with the preparation of his tax returns. Additionally, Acker was an experienced tax accountant and, therefore, was uniquely qualified to evaluate the quality of petitioner's responses to his advice, questions and comments. Further, it is undeniable that Acker's observations of petitioner related directly to his excluded opinions. Accordingly, the questions asked of Acker were within the purview of Rule 701(a).

Similarly, the cited questions also satisfied the requirement of Rule 701(b)—that the opinions or inferences be "helpful to a clear understanding of [the witness'] testimony or the determination of a fact in issue". The fact that Acker believed petitioner might not have realized that the $15,000 professional fee was reported on the Acker 1040, as has been noted above, both refuted inculpatory inferences to be drawn from Acker's earlier testimony (that petitioner agreed to the "reclassification" of the $15,000 on the company's books) and confirmed the defense's view that petitioner was a man not competent to understand what was happening with his tax returns. The key "fact in issue" was petitioner's intent—an essential element of the crimes charged.

The excluded testimony from Acker on the issue of petitioner's competence and understanding of the Acker 1040 is precisely analogous to the testimony of lay witnesses concerning the mental condition and capacity of a defendant claiming insanity as a defense. In the latter situation, it has been widely held that such testimony is admissible. *See e.g., United States* v. *Segna,* 555 F.2d 226, 230 (9th Cir. 1977); *United States* v. *Caldwell,* 543 F.2d 1333, 1349 (D.C. Cir. 1974); *United States* v. *Dresser,* 542 F.2d 737, 742-43 (8th Cir. 1976); *Wilson* v. *Bailey,* 375 F.2d 663, 667 (6th Cir. 1967). *See generally Weinstein's Evidence* ¶ 701[02] (1978 ed.).

For the purpose of determining the admissibility of evidence, it is submitted that there is no rational basis to distinguish between lay opinion testimony regarding the defendant's sanity and the Acker opinion evidence on the issue of defendant's mental state in this case. This is particularly true where, in case at bar, the "lay witness" was very experienced in dealing with clients on a daily basis about matters relating directly to their tax returns.

Moreover, Malinofsky's evaluation of the condition of petitioner's files and his observation of petitioner's ability to distinguish between a financial statement and a corporate return were "rationally based on [Malinofsky's] perception [of petitioner and his files]" (see FRE Rule 701(a)). The disorganization of petitioner's files—as it reflected his confused mental state—was "helpful to . . . the determination of a fact in issue [whether he 'knew what he was doing'—as the Government alleged (Tr. 476)]" (see FRE Rule 701(b)). Further, whether petitioner knew the difference between a financial statement and a corporate return was both helpful to a determination of that same issue *and* helpful to a clear understanding of Malinofsky's earlier testimony that Pliss had not given him the corporate return that he needed until December 1974 (see FRE Rule 701(b)). Thus the Malinofsky testimony sought by the defense was not excludable as "opinion" testimony.

Unfortunately, what has been demonstrated here is that the trial court excluded from the jury's consideration extremely relevant evidence on the issue of defendant's state of mind. In so ruling, the court denied petitioner the "wide latitude in the introduction of evidence which tends to show lack of specific intent" (*United States* v. *Sternstein, supra,* 598 F.2d at 530), to which he is constitutionally entitled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
March 7, 1980

Respectfully submitted,

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APPENDIX

APPENDIX A

Judgment of the Court of Appeals.

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of January one thousand nine hundred and seventy-nine [sic].

Present: HON. LEONARD P. MOORE
HON. HENRY J. FRIENDLY
HON. THOMAS J. MESKILL
Circuit Judges,

79-1335

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN PLISS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. Daniel Fusaro,
Clerk

Arthur Heller,
By: Arthur Heller,
Deputy Clerk

APPENDIX B

Constitutional Provisions and Statutes Involved.

Constitutional Provisions:

The Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the rigth to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes:

Title 26 U.S.C. Section 7201:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Title 26 U.S.C. Section 7206:

Any person who—

> (1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;
>
> * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1376

In the Supreme Court of the United States

OCTOBER TERM, 1979

STEPHEN PLISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue a written opinion. The order of the court of appeals (Pet. App. A1-A2) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1980. By order dated January 28, 1980, Mr. Justice Marshall extended the time for

filing a petition for a writ of certiorari to March 7, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's exclusion of certain evidence deprived petitioner of a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of attempted income tax evasion for 1973, in violation of 26 U.S.C. 7201, and of subscribing to a false income tax return for that year, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to four months' imprisonment and a fine of $10,000 (Pet. 2). The court of appeals affirmed (Pet. App. A1-A2).

The evidence adduced at trial showed that from 1961 to 1974 petitioner was the sole stockholder and employee of Stephen Associates, Inc., an advertising firm that specialized in placing advertisements for commercial enterprises with radio stations throughout the country. For accounting purposes, Stephen Associates elected to be treated as a Subchapter S corporation from 1962 until September 30, 1974 (Pet. 3). As a result of the election, the corporation was required to file a federal income tax return, but paid no income tax on its profits. Rather, the corporation's profits were required to be reported on petitioner's individual income tax return as income,

whether or not such profits were distributed to him (Tr. 35-36).[1]

For many years, petitioner had retained Howard Acker, an accountant, to prepare both Stephen Associates' corporate income tax returns and his individual income tax returns. After the end of each of the corporation's taxable years (ending on September 30), petitioner would bring both the corporate and his individual financial records to Acker's office so that Acker's staff could prepare the corporation's books of account, its financial statements, its tax returns, and petitioner's individual tax returns (Tr. 37-39, 79-80). Before completing the accounting work, Acker would meet with petitioner to review the results and to obtain petitioner's approval for various accounting decisions (Tr. 39, 43, 53, 338-339).

In preparing Stephen Associates' tax returns for its taxable year ended September 30, 1972, Acker employed an accounting device designed to reduce the corporation's state and city taxes. Those taxes were computed according to alternative formulae based on either executive compensation or corporate profits. By describing a $5,000 amount as a professional fee paid by Stephen Associates to petitioner rather than as corporate profit, Acker was able to take advantage of the more favorable state and city tax formula for Stephen Associates. As a result of

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[1] "Tr." refers to the trial transcript. "GX" and "DX" refer to the exhibits admitted at trial. "A." refers to the record appendix filed in the court of appeals.

this treatment, petitioner's 1972 individual federal income tax return reported three different types of income received from Stephen Associates—salary, corporate profit reportable pursuant to Subchapter S, and professional fee income (GX 5; Tr. 50). For the taxable year ended September 30, 1973, Acker employed the same device to reduce Stephen Associates' state and city tax liabilities, this time allocating $15,000 as a corporate expense for a professional fee paid to petitioner. Acker specifically obtained petitioner's approval to reduce the corporation's profit by recording the $15,000 as a professional fee to petitioner (Tr. 41-42, 54, 123, 125-127, 134-135).

On April 1, 1974, Acker prepared and delivered to petitioner a completed personal income tax return for 1973. As in the case of the 1972 return, the 1973 return reported three items of income that petitioner received from Stephen Associates—petitioner's salary of $26,000, Subchapter S earnings of $9,671 and the $15,000 professional fee. The return showed a tax due and owing of $10,986 (GX 1). Petitioner, however, never filed that return. Instead, he hired Murray Malinofsky, an accountant, to prepare his 1973 personal income tax return (Tr. 182-183, 185-187, 212, 215). When he first met with petitioner in March 1974, Malinofsky noticed from records supplied by petitioner that Stephen Associates had been a Subchapter S corporation and asked petitioner for a copy of the corporation's Subchapter S return for the taxable year ending September 30, 1973, so that he could prepare petitioner's personal tax return for

1973 (Tr. 180-183). Petitioner responded that he did not have a corporate return for 1973 because an extension had been obtained for filing that return (Tr. 181). Petitioner also told Malinofsky that he did not know whether the corporation was a Subchapter S corporation or a regular corporation because he had asked his previous accountant to remove the corporation from Subchapter S status (Tr. 183-184). Malinofsky stated that he could not prepare petitioner's individual income tax return for 1973 until he knew the status of the corporation and that he would get an extension for filing the personal return (Tr. 183).

On April 12, 1974, Acker delivered to petitioner the corporation's tax return for the taxable year ended September 30, 1973 (Tr. 58-60). The return stated that the corporation had operated as a Subchapter S corporation for that taxable year (GX 4; A. 36-42). In June 1974, Malinofsky met with petitioner prior to filing petitioner's individual tax return for 1973 (Tr. 189-190). Malinofsky asked petitioner whether he had received the corporate return, and petitioner responded that he had not (Tr. 190, 197). At no time did petitioner tell Malinofsky that he had in fact already received a completed 1973 individual income tax return from Acker on April 12, 1974 (Tr. 238).[2] On the individual income tax return prepared by Malinofsky and eventually filed by peti-

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[2] In fact, petitioner subsequently told Malinofsky that he had not yet received the corporate return from Acker (Tr. 58-60, 190, 196).

tioner, the only income reported was petitioner's salary from the corporation. The professional fee and the corporate profits were omitted (Tr. 26; GX 2).

In December 1974, petitioner met with Malinofsky, who determined that Stephen Associates had, in fact, been a Subchapter S corporation during 1973. Based upon this determination, Malinofsky prepared an amended return reporting the $9,671 of corporate profits. However, the amended return still omitted the $15,000 professional fee received by petitioner from the corporation (GX 3). Although Malinofsky asked petitioner about the professional fee expense to the corporation, petitioner professed ignorance and gave no indication to Malinofsky that the fee represented income he was required to report (Tr. 222, 225-227). Petitioner maintained this position despite the fact that Acker had explained to him the proper tax treatment of the professional fee (Tr. 41-42, 48, 54, 123, 125-127; GX 5). The amended return was filed on January 6, 1975 (Tr. 26-27; GX 3).

In April 1975, a special agent of the Internal Revenue Service informed petitioner that he was under investigation and spoke to him about his 1973 individual return (Tr. 292-293). In June 1975, petitioner filed a second amended return for 1973. This return included the professional fee (Tr. 383-384).

At trial, petitioner testified in his own behalf. Despite petitioner's obvious success in the advertising industry and his experience in large-scale commodity and stock market transactions (Tr. 441-442), petitioner claimed that he was wholly ignorant of his corporation's tax and accounting matters, so

that he did not have the requisite criminal intent to evade tax or to file a false return (Tr. 520-536). In support of this claim, petitioner sought to establish that the $15,000 professional fee item was a complex paper transaction unrelated to income he actually received (Tr. 121-132, 512, 527).

During the trial, petitioner sought to introduce two worksheets prepared by Acker that related to cash disbursements of Stephen Associates for 1974 (A. 59, 75). The district court excluded the worksheets as irrelevant (Tr. 159-163). Petitioner also attempted to introduce certain opinion testimony from his two accountants. However, the district court sustained the government's objections to this line of testimony on the ground that it called for speculation and conjecture with respect to petitioner's knowledge and belief (Tr. 169, 175, 227-228).

ARGUMENT

1. Petitioner contends (Pet. 7-14) that the district court erred in excluding certain proffered evidence and that this error warrants reversal. The documents excluded were cash disbursement sheets of his corporation for the taxable year ended September 30, 1974 (DX K; A. 75-78), and a so-called "Comparison and Analysis of Cash Withdrawal and Expenses * * *" for the fiscal year ended September 30, 1974 (DX I; A. 59; Tr. 148-149, 159-163). Petitioner claims that the documents would have established that the corporation did not actually disburse to him a $15,000 professional fee in 1973. He sug-

gests that, had the documents not been excluded, he could have effectively argued that because he did not physically receive the $15,000, he had not realized that he had to pay taxes on the professional fee. Petitioner argues that he could have thus demonstrated his lack of willfulness—an element of the crime of tax evasion. Petitioner asserts that the error in excluding this evidence was exacerbated by the government's argument that the money was actually distributed to him in 1973.

The district court did not err in excluding these documents. The excluded documents related to the corporation's taxable year 1974. Although the documents recorded certain financial transactions of the corporation that occurred in 1973, they recorded only those transactions from the last three months of that year, a period that fell within the corporation's 1974 taxable year. Since the $15,000 professional fee was incurred by the corporation during its taxable year ending September 30, 1973, this fee would not have appeared in the excluded documents whether or not it was actually distributed to petitioner. The documents in question were accordingly irrelevant to petitioner's defense, and the district court correctly excluded them from evidence. See *United States* v. *Elsbery*, 602 F.2d 1054, 1057-1058 (2d Cir. 1979).[3]

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[3] *United States* v. *Garber*, 607 F.2d 92 (5th Cir. 1979); *United States* v. *Sternstein*, 596 F.2d 528 (2d Cir. 1979); *United States* v. *Brown*, 411 F.2d 1134 (10th Cir. 1969); and *Haigler* v. *United States*, 172 F.2d 986 (10th Cir. 1949), cited by petitioner (Pet. 9-11), are distinguishable. In those cases the evidence excluded was at least arguably relevant.

Moreover, even if the excluded documents with respect to the corporation's taxable year 1974 had some marginal relevance, their exclusion did not undercut petitioner's claim that he did not receive the professional fee. The corporation's cash disbursement records for its taxable year 1973 (DX F, G, H, and J) were admitted into evidence on petitioner's motion (Tr. 149-150, 163-164). If, in fact, these more relevant records indicated that there had been no actual disbursement of a $15,000 fee to petitioner during the corporation's taxable year 1973, they provided all of the support necessary to enable petitioner to argue his claim.

Finally, contrary to petitioner's assertion (Pet. 7-8), the prosecution did not proceed on the theory that the $15,000 fee was actually distributed to petitioner and that he must therefore have known that he was required to report that fee as income on his tax return. Rather, the government argued at trial that petitioner's willfulness in omitting the $15,000 fee from his personal income tax return was proved by the facts that he had paid tax on an identically described professional fee item in 1972 (GX 5; Tr. 50); that he withheld from Malinofsky both the personal and corporate returns prepared by Acker (Tr. 56-60, 183-184, 238); that petitioner falsely told Malinofsky that he knew nothing about the professional fees (Tr. 185, 222, 225-227); that petitioner falsely told IRS agents that he had not received the personal income tax return prepared by Acker (Tr. 382-383); and that petitioner must have known that the expense

for the professional fees reported on Stephen Associates' return could only have been a reference to a fee attributable to him because he signed all of the checks issued by the corporation (Tr. 479-500).

Despite this overwhelming evidence of willfulness, petitioner nevertheless contends (Pet. 11) that the government argued to the jury that the $15,000 was actually distributed to him. But the prosecutor's argument only took issue with petitioner's defense that the $15,000 fee was merely a paper transaction of no benefit to petitioner. The prosecutor's statement that "he got it" was not an assertion that petitioner physically received $15,000 cash, but merely an assertion that petitioner had benefitted from the transaction involving the $15,000 fee (Tr. 557-558). Indeed, if there had been no professional fee deductible in the computation of the corporation's profits, those profits, chargeable to him as the sole shareholder of a Subchapter S corporation, would have been greater by $15,000.

2. Petitioner also contends (Pet. 14-19) that the district court erred in sustaining the government's objections to three questions he asked of Acker and four questions he asked of Malinofsky. In petitioner's view, these rulings unfairly deprived him of the opportunity to elicit proof that he did not understand that the professional fee was income to him. The pertinent facts are as follows: During Acker's cross-examination, petitioner's counsel asked him "* * * whether it would be obvious to someone looking at that 1120S that $50,000 [*sic*] in fees would

be taxable to Stephen Pliss?" (Tr. 169); "whether or not in [his] estimation * * * Pliss might not have realized that the $15,000 of the corporate income was reflected in the 1040?" (Tr. 170); and whether it was Acker's "testimony that Mr. Pliss realized that the $15,000 of corporate income is reflected in his 1040 as a fee?" (Tr. 175).

These questions asked Acker to speculate as to what petitioner was thinking—something Acker could not have known. Such speculation is inadmissible. See Fed. R. Evid. 602 and 701. Rule 701 permits the trial judge, in his discretion, to decide whether lay opinion testimony should be admitted. The rule was intended to eliminate the need for drawing the often "elusive" distinction between "fact" and "opinion." See Notes of Advisory Committee on Proposed Rules, Rule 701. The rule was designed to make clear that "The emphasis belongs on what the witness knows and not on how he is expressing himself." 3 *Weinstein's Evidence* ¶ 701 [02], at 701-9 to 701-717 (1978). Here, the questions put to Acker did not call for the type of lay conclusion envisioned by the rule. There was no way for Acker to know what the petitioner was thinking with respect to the $15,000 fee. See *United States* v. *Jackson*, 569 F.2d 1003, 1011, n.17 (7th Cir.), cert. denied, 437 U.S. 907 (1978). The trial court therefore correctly foreclosed this line of inquiry.

The district court also sustained the government's objections to two broad and vague questions put to Malinofsky with respect to petitioner's record-keep-

ing. Petitioner's counsel asked Malinofsky to describe the "quality" of petitioner's record keeping and whether Malinofsky thought petitioner's files were "orderly" (Tr. 227, 228). When counsel narrowed the focus of his question and asked Malinofsky whether the files were "categorized," Malinofsky was permitted to answer, without objection (Tr. 229). Thus, even if the district court erred in sustaining the government's objections, any such error was harmless.

The district court also sustained the government's objections to two further questions put to Malinofsky by which petitioner sought to establish his inability to distinguish between his tax return and the corporation's financial statement (Tr. 230, 231). Malinofsky had testified that during a meeting in petitioner's office, petitioner showed Malinofsky a financial statement when Malinofsky asked him for a copy of his corporate return (Tr. 229). To buttress the claim that petitioner was unsophisticated in financial matters, petitioner's counsel then asked Malinofsky the reasons for petitioner's mistake.[4]

But these questions put to Malinofsky called for his conjecture about petitioner's knowledge and belief

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[4] The two questions to which objections were sustained were the following:

> Do you know whether or not he [petitioner] gave you that [financial] statement in the belief that it was a corporate return? (Tr. 230.)
>
> Did he [the petitioner] know what the corporate return was? (Tr. 231.)

and for speculation with respect to his motive for acting as he did. See Rule 701, Fed. R. Evid. The district court therefore properly sustained the government's objections to these questions. At all events, Malinofsky was not precluded from testifying as to what petitioner said and did at the time of the incident. Moreover, petitioner testified and had ample opportunity to explain his understanding of his 1973 tax returns, the professional fee, and his confusion of his corporation's financial statement with his federal income tax return. Thus, any error the district court may have committed in sustaining the government's objections to counsel's questions was entirely harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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